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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

AUSTEENE GEORGE COOPER, Plaintiff and Appellant, v. COUNTRYWIDE HOME LOANS et al., Defendants and Respondents.	B266378 (Los Angeles County Super. Ct. No. SC122150)

APPEAL from an order of the Superior Court of Los Angeles County, Lawrence Cho, Judge. Affirmed.

Law Office of Richard L. Antognini and Richard L. Antognini for Plaintiff and Appellant.

Bryan Cave, Andrea Hicks, Monica Kohles and Jennifer Steeve for Defendants and Respondents.

Plaintiff and appellant Austeene George Cooper (Cooper) appeals an order of dismissal entered after the trial court sustained without leave to amend a demurrer filed by defendants and respondents Countrywide Home Loans, Inc. (Countrywide), ReconTrust Company, N.A. (ReconTrust), Mortgage Electronic Registration Systems, Inc. (MERS), and The Bank of New York Mellon (Mellon) (collectively, Defendants).

Cooper contends that she is entitled to proceed with this preforeclosure lawsuit because the assignment of her deed of trust to a securitized trust after the securitized trust's closing date rendered the assignment void. We conclude that a belated assignment of a trust deed to a securitized trust is merely *voidable* rather than void, and thus Cooper lacks standing to challenge that alleged defect in the assignment. (*Saterbak v. JPMorgan Chase Bank, N.A.* (2016) 245 Cal.App.4th 808, 815 (*Saterbak*).) Cooper also alleged she was fraudulently induced to refinance her loan with Countrywide in 2007 with the promise of lower loan payments. However, Cooper did not file suit until 2014, and the pleading discloses on its face that the fraud claim is time-barred. Therefore, the order of dismissal is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND[1]

1. *Pleadings*.

Cooper filed this action on March 4, 2014, and filed the operative first amended complaint (FAC) on January 5, 2015. She pled six causes of action: fraud, unfair competition (Bus. & Prof. Code, § 17200), rescission, quiet title, declaratory relief, and

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1 On February 11, 2014, ReconTrust recorded a Notice of Trustee's sale, but the notice was rescinded the following month, and according to Cooper, no foreclosure is pending at present.

slander of title. The substance of Cooper's allegations is as follows:

In late 2006, Cooper was induced by Reid Mitchell (Mitchell), a Countrywide employee, to refinance her Beverly Hills home. Mitchell advised Cooper to refinance her longtime residence into a safer fixed-rate loan because it would lower her payments. He was aware that Cooper's true income did not qualify her for a refinance because he had copies of her tax returns; thus, in order to qualify Cooper for the loan, Mitchell falsely typed in on her loan application that her income was $15,000 per month. Instead of lowering Cooper's payments, the new loan actually increased her monthly payment from $2,608 to $4,327. Mitchell also did not disclose to Cooper that she would incur a $22,000 prepayment penalty on her existing Countrywide loan, as well as $30,000 in closing costs. The new loan, in the amount of $700,000, closed on January 2, 2007, but Cooper did not discover the fraud until on or after December 14, 2011, when her attorney explained to her the meaning of a loan audit. Until then, Cooper had been unaware that her loan payments had increased instead of decreased because her dishonest personal business manager had been making all of the loan payments on her behalf since 2007.

Cooper also alleged a theory of defective securitization, to wit: Her deed of trust purportedly was owned by Series 2007-6, a securitized trust of which Mellon was trustee. According to the Pooling and Service Agreement (PSA) that governed the securitized trust, the cut-off date for loans to be accepted into the securitized trust was February 1, 2007, and the closing date for the securitized trust was February 27, 2007. However, Cooper's deed of trust was not assigned by MERS to Mellon until June

7, 2011, making the purported assignment void as a matter of New York trust law. As a result of Defendants' conduct, "she was in danger of losing her home if the Defendants, or any of them, again commence non-judicial foreclosure proceedings."

2. *Demurrer*.

Defendants demurred, asserting that Cooper's theory of defective securitization failed as a matter of law because Cooper lacked standing to challenge the securitization; Cooper could not show she was prejudiced by the securitization; Cooper's preforeclosure challenge to Defendants' authority to initiate a foreclosure was barred by California's comprehensive nonjudicial foreclosure statutory scheme; and Cooper failed to plead facts showing any impropriety in the securitization of her loan. Defendants also argued, inter alia, the cause of action for fraud was barred by the three-year statute of limitations because Cooper admittedly signed the loan documents, and had the ability to discover the terms of her loan, in December 2006. Thus, there was no delayed accrual of the cause of action.

3. *Trial court's ruling*.

On June 17, 2015, the trial court heard the matter and sustained the demurrer without leave to amend.

The trial court first concluded that Cooper had failed to allege her standing to challenge the assignment of her debt. It explained: "Plaintiff relies on *Glaski v. Bank of America* (2013) 218 Cal.App.4th 1079 [(*Glaski*)] for the proposition that a [borrower] has standing to challenge the procedure for the [lender] to securitize the mortgage. Countrywide cites to *Jenkins v. JP Morgan Chase Bank* (2013) 216 Cal.App.4th 497 [(*Jenkins*)], a pre-*Glaski* decision which flatly holds the opposite. *Id*. at 515. Countrywide [also] cites to numerous federal

authorities interpreting California law which declined to follow *Glaski* and have labeled such as an outlier case and asks this Court to adopt this same view. In reading *Glaski* and *Jenkins*, which were published within 3 months of each other in 2013, this Court finds that they are diametrically opposed on the issue of standing of a borrower to challenge securitization. . . . . This Court chooses to follow the majority view adopted by the federal courts cited by Countrywide and relegate *Glaski* as an outlier case. This Court agrees with the logic in *Jenkins* in that the borrower's position does not change at all when a mortgage debt and its accompanying deed of trust collateral are transferred; the borrower still owes on the debt and is still subject to having his home foreclosed upon if he fails to honor that debt."

After ruling that Cooper had failed to allege she had standing to challenge the assignment of her debt, the trial court also ruled that Cooper had failed to allege that the securitization of her debt had caused her any damages. It explained: "This Court also agrees with Countrywide that prejudice, or harm, must be pled in all of the causes of action in Plaintiff's FAC. Damages is an essential element of any civil suit, as is the allegation that the alleged wrongdoing was the cause of such damages. Failure to allege damages or causation renders a cause of action vulnerable to demurrer. This general principle applies within the realm of challenging a bank foreclosure (or in this case, the fear of one). . . . . [¶] . . . . Plaintiff here . . . concedes that the loan was defaulted upon but attacks the securitization of [her] defaulted loan without alleging how the securitization has caused [her] any damages. Even assuming the truth of Plaintiff's untimely securitization of [her] loan, Plaintiff's position would be exactly the same as if the securitization was timely: the balance

of the $700,000 loan Plaintiff borrowed would still remain outstanding and would not, as Plaintiff argues, simply disappear with a puff of smoke. The speculative harm alleged of the potential for a foreclosure proceeding stems not from the alleged untimely securitization, but rather from the fact that [she] defaulted on the loan. Furthermore, given that Countrywide has rescinded its Notice of Default and reinstated the Deed of Trust, there is no foreclosure action pending and this Court does not see how Plaintiff will be able to amend [her] complaint to allege actual damages or how those damages were caused by the alleged improprieties in the securitization."

On these two bases, the trial court sustained the demurrer to the entire complaint without leave to amend. Additionally, with respect to the individual causes of action, the trial court ruled, inter alia:

On the fraud claim, the trial court found Cooper had failed to allege a basis for delayed discovery, and it agreed with Countrywide that the alleged broken promises would have been obvious to Cooper at the time the refinance loan closed; therefore, the fraud claim was barred by the three-year statute of limitations. (Code Civ. Proc., § 338, subd. (d).) "In alleging delayed discovery, Plaintiff is required to show that she and her 'agents had no actual knowledge or presumptive knowledge of facts sufficient to put it on inquiry.' [Citation.] Her FAC, in fact, shows the opposite--that her agent had notice as early as 2007 when the loan payments were made by him. [¶] Moreover, Plaintiff's allegations that her agent was dishonest [are] insufficient to overcome the statute of limitations."

On the quiet title claim, the trial court found that Cooper's arguments regarding the validity of the underlying debt were

meritless, and therefore her failure to allege tender precluded her from stating a cause of action for quiet title.

Cooper filed a timely notice of appeal from the order of dismissal.

CONTENTIONS

Cooper contends: under the Supreme Court's recent decision in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919 (*Yvanova*), she can allege standing and is not required to allege prejudice; the trial court relied on a series of cases that *Yvanova* has disapproved; because she alleges the securitized trust does not own her loan, she need not allege tender; because she alleges specific facts to show the assignment is void, she is entitled to bring a preforeclosure action; in addition, her business manager's knowledge should not be imputed to her, and thus she should be able to plead delayed discovery of Countrywide's alleged fraud.

DISCUSSION

1. *Standard of appellate review*.

Our review of the trial court's order sustaining the demurrer without leave to amend is governed by well settled principles. " '[O]ur standard of review is de novo, "i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law." [Citation.]' [Citation.] ' " 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.]" ' [Citation.] 'We affirm if any ground offered in support of the demurrer was well taken but find error if the plaintiff has stated a cause of action under any possible legal theory. [Citations.] We are not bound

by the trial court's stated reasons, if any, supporting its ruling; we review the ruling, not its rationale. [Citation.]' [Citation.]" (*Walgreen Co. v. City and County of San Francisco* (2010) 185 Cal.App.4th 424, 433 (*Walgreen*).)

2. *Cooper cannot maintain this preemptive action to challenge the anticipated foreclosure; the alleged assignment of her deed of trust to a securitized trust occurring after the securitized trust's closing date is merely voidable and not void, and therefore the power to ratify or avoid the transaction lies solely with the parties to the assignment.*

Before addressing Cooper's various arguments on appeal, we set forth certain controlling principles which prevent Cooper from maintaining a preemptive preforeclosure action challenging the assignment and securitization of her debt.

As set forth in greater detail below, California's nonjudicial foreclosure statutes provide a comprehensive framework for the regulation of nonjudicial foreclosures. Nowhere does the statutory scheme provide for a judicial action to determine whether the person initiating the foreclosure process is authorized to do so, and there are no grounds for implying such an action. (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154-1155 (*Gomes*).) Further, recognition of such a right would "fundamentally undermine the nonjudicial nature of the process and introduce the possibility of lawsuits filed solely for the purpose of delaying valid foreclosures." (*Id.* at p. 1155; accord, *Jenkins*, *supra*, 216 Cal.App.4th at p. 513.)

Jenkins is illustrative. There, the plaintiff alleged the trustee of a securitized investment trust had no authority to initiate foreclosure because "the promissory note was not transferred into the investment trust with a complete and

unbroken chain of endorsements and transfers . . . ." (*Jenkins*, *supra*, 216 Cal.App.4th at p. 510.) The trial court sustained the defendants' demurrers without leave to amend. The appellate court affirmed, citing *Gomes* for the proposition that California's comprehensive nonjudicial foreclosure scheme does not provide for a preemptive action to challenge the authority of the party initiating foreclosure. (*Id.* at p. 513.) The court explained: "[W]e agree with the *Gomes* court that the [statutory nonjudicial foreclosure] provisions do not contain express authority for such a preemptive action. Also, even if the statutes are interpreted broadly, it cannot be said the provisions imply the authority for such a preemptive action exists, because doing so would result in the impermissible interjection of the courts into a nonjudicial scheme enacted by the California Legislature. [Citations.] 'The recognition of the right to bring a lawsuit to determine a nominee's authorization to proceed with foreclosure on behalf of the note holder would fundamentally undermine the nonjudicial nature of the process and introduce the possibility of lawsuits filed solely for the purpose of delaying valid foreclosures.' (*Gomes*, *supra*, 192 Cal.App.4th at p. 1155.)" (*Jenkins*, *supra*, at p. 513.)[2]

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[2] *Jenkins* also held a homeowner/borrower lacked standing to allege an improper securitization (or any other invalid assignments or transfers of the promissory note subsequent to her execution of the note) because she was an unrelated third party to the alleged securitization and thus had no right to enforce the investment trust's pooling and servicing agreement. (*Jenkins*, *supra*, 216 Cal.App.4th at pp. 514-515.) As discussed below, the Supreme Court in *Yvanova* later disapproved *Jenkins* to the extent that *Jenkins* precluded a borrower from challenging

Notwithstanding the prohibition on preemptive preforeclosure actions, Cooper's theory is that she is entitled to bring a preforeclosure action because the closing date for the Mellon securitized trust was February 27, 2007, and her deed of trust was not assigned to the securitized trust until June 7, 2011, making the purported assignment *void* as a matter of New York trust law. However, the weight of authority holds that an untimely assignment to a securitized trust, made after the securitized trust's closing date, is not void but merely voidable. (*Saterbak*, *supra*, 245 Cal.App.4th at p. 815; *Rajamin v. Deutsche Bank Nat'l Trust Co.* (2d Cir. 2014) 757 F.3d 79, 88-89 (*Rajamin*); compare *Glaski*, *supra*, 218 Cal.App.4th at p. 1097.) "When an assignment is merely voidable, the power to ratify or avoid the transaction lies solely with the parties to the assignment; the transaction is not void unless and until one of the parties takes steps to make it so. A borrower who challenges a foreclosure on the ground that an assignment to the foreclosing party bore defects rendering it voidable could thus be said to assert an interest belonging solely to the parties to the assignment rather than to herself." (*Yvanova*, *supra*, 62 Cal.4th at p. 936.)

Therefore, Cooper lacks standing to challenge the belated assignment of her debt to the securitized trust. California's nonjudicial foreclosure scheme does not authorize this preemptive action challenging the validity of a voidable assignment.

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an assignment that is *absolutely void*. (*Yvanova*, *supra*, 62 Cal.4th at p. 939.)

3. *Cooper's reliance on* Yvanova *is misplaced*.

a. *The* Yvanova *decision*.

At the time the trial court ruled on the demurrer, it did not have the benefit of *Yvanova*, which was decided during the pendency of this appeal. Before addressing Cooper's attempt to rely on *Yvanova*, we summarize the Supreme Court's holding therein.

Yvanova arose out of the allegedly wrongful foreclosure of the plaintiff's home by the lienholder. The Supreme Court granted review to consider an extremely narrow question: "whether the borrower on a home loan secured by a deed of trust may base an action for wrongful foreclosure on allegations a purported assignment of the note and deed of trust to the foreclosing party bore defects rendering the assignment *void*." (*Yvanova*, *supra*, 62 Cal.4th at p. 923, italics added.) As to that limited issue, the Supreme Court concluded that the borrower has standing "to claim a nonjudicial foreclosure was wrongful because an assignment by which the foreclosing party purportedly took a beneficial interest was not merely voidable but *void*." (*Id.* at pp. 942-943, italics added.) The court's holding was explicitly narrow, declining to reach, among other questions, whether a homeowner had standing to preemptively challenge the assignment of the beneficial interest, *prior to foreclosure*. The court explained the narrow reach of its holding as follows: "We do not hold or suggest that a borrower may attempt to preempt a threatened nonjudicial foreclosure by a suit questioning the foreclosing party's right to proceed. Nor do we hold or suggest that plaintiff in this case has alleged facts showing the assignment is void or that, to the extent she has, she will be able to prove those facts. Nor, finally, in rejecting defendants'

arguments on standing do we address any of the substantive elements of the wrongful foreclosure tort or the factual showing necessary to meet those elements." (*Id.* at p. 924.)

Yvanova agreed with *Glaski*, *supra*, 218 Cal.App.4th 1079, to the extent *Glaski* held "a wrongful foreclosure plaintiff has standing to claim the foreclosing entity's purported authority to order a trustee's sale was based on a void assignment of the note and deed of trust." (*Yvanova*, *supra*, 62 Cal.4th at p. 939.) *Yvanova* rejected *Jenkins* insofar as that decision "spoke too broadly in holding a borrower lacks standing to challenge an assignment of the note and deed of trust to which the borrower was neither a party nor a third party beneficiary. *Jenkins*'s rule may hold as to claimed defects that would make the assignment merely voidable, but not as to alleged defects rendering the assignment *absolutely void*." (*Yvanova*, *supra*, at p. 939, italics added.)

b. *No merit to Cooper's argument that* Yvanova *enables her to allege standing.*

Unlike *Yvanova*, which was an action for wrongful foreclosure, Cooper's action is a *preforeclosure* lawsuit. Although Cooper seeks to construe *Yvanova* as giving her standing to sue, *Yvanova* clearly stated that it did "not hold or suggest that a borrower may attempt to preempt a threatened nonjudicial foreclosure by a suit questioning the foreclosing party's right to proceed." (*Yvanova*, *supra*, 62 Cal.4th at p. 924.) In this regard, *Yvanova* further stated: "*Jenkins* held California law did not permit a 'preemptive judicial action[ ] to challenge the right, power, and authority of a foreclosing "beneficiary" or beneficiary's "agent" to initiate and pursue foreclosure.' (*Jenkins*, *supra*, 216 Cal.App.4th at p. 511.) Relying primarily on *Gomes*[, *supra*,]

192 Cal.App.4th 1149, *Jenkins* reasoned that such preemptive suits are inconsistent with California's comprehensive statutory scheme for nonjudicial foreclosure; allowing such a lawsuit ' "would fundamentally undermine the nonjudicial nature of the process and introduce the possibility of lawsuits filed solely for the purpose of delaying valid foreclosures." ' (*Jenkins*, at p. 513, quoting *Gomes* at p. 1155.) [¶] *This aspect of Jenkins, disallowing the use of a lawsuit to preempt a nonjudicial foreclosure, is not within the scope of our review*, which is limited to a borrower's standing to challenge an assignment in an action seeking remedies for *wrongful foreclosure*. As framed by the proceedings below, the concrete question in the present case is whether plaintiff should be permitted to amend her complaint to seek redress, in a wrongful foreclosure count, for the trustee's sale that has already taken place. We do not address the distinct question of whether, or under what circumstances, a borrower may bring an action for injunctive or declaratory relief to prevent a foreclosure sale from going forward." (*Yvanova*, *supra*, 62 Cal.4th at pp. 933-934, certain italics added.)

Saterbak, *supra*, 245 Cal.App.4th 808, illuminates the narrow nature of *Yvanova*'s holding. In *Saterbak*, as here, the plaintiff brought a preforeclosure lawsuit challenging the defendant's ability to foreclose; the plaintiff pled, inter alia, that the deed of trust was not timely assigned to a real estate mortgage investment conduit (REMIC) trust because MERS did not assign the deed of trust to the REMIC trust until years after the REMIC trust's closing date, rendering the assignment "void." (*Id*. at p. 814.)

Saterbak held the plaintiff lacked standing to challenge the assignment, explaining: "The California Supreme Court recently

held that a borrower has standing to sue for wrongful foreclosure where an alleged defect in the assignment renders the assignment void. (*Yvanova*, *supra*, 62 Cal.4th at pp. 942-943.) However, *Yvanova*'s ruling is expressly limited to the post-foreclosure context. (*Id*. at pp. 934-935 ('narrow question' under review was whether a borrower seeking remedies for *wrongful foreclosure* has standing, not whether a borrower could *preempt* a nonjudicial foreclosure).) *Because Saterbak brings a preforeclosure suit challenging [d]efendant's ability to foreclose, Yvanova does not alter her standing obligations*." (*Saterbak*, *supra*, 245 Cal.App.4th at p. 815, certain italics added.)

In view of the above, we conclude there is no merit to Cooper's theory that *Yvanova* enables her to allege standing to bring this *preforeclosure* lawsuit alleging a void assignment. As discussed, a belated assignment to a securitized trust is merely voidable, not void. Further, *Yvanova* did not disapprove *Jenkins*'s disallowing the use of a lawsuit to preempt a nonjudicial foreclosure. (*Yvanova*, *supra*, 62 Cal.4th at p. 934; *Jenkins*, *supra*, 216 Cal.App.4th at p. 513.)

c. *No merit to Cooper's additional argument that* Yvanova *enables her to allege standing without having to allege prejudice or harm.*

(1) *Trial court's ruling.*

The trial court explained in some detail its conclusion that Cooper had failed to allege how she was injured by any improprieties in the securitization of her debt. It stated: "This Court also agrees with Countrywide that prejudice, or harm, must be pled in all of the causes of action in Plaintiff's FAC. Damages is an essential element of any civil suit, as is the allegation that the alleged wrongdoing was the cause of such

damages. Failure to allege damages or causation renders a cause of action vulnerable to demurrer. This general principle applies within the realm of challenging a bank foreclosure (or in this case, the fear of one). *Fontenot v. Wells Fargo Bank* (2011) 198 Cal.App.4th 256, 272 ('a plaintiff in a suit for wrongful foreclosure has generally been required to demonstrate the alleged imperfection in the foreclosure process was prejudicial to the plaintiff's interests' and no prejudice alleged when plaintiff 'effectively concedes she was in default, and she does not allege that the [improper] transfer . . . interfered in any manner with her payment of the note'); *Siliga v. Mortgage Electronic Registration Systems, Inc.* [(2013)] 219 Cal.App.4th 75, 85 (Borrowers['] complaint against foreclosing party fails to allege prejudice where they 'do not dispute that they are in default under the note . . . [and] the assignment of the deed of trust and note did not change [their] obligations under the note, and there is no reason to believe that . . . the original lender would have refrained from foreclosure . . . [A]bsent any prejudice, the Siligas have no standing to complain about any alleged lack of authority or defective assignment');[3] *Melendrez v. D & I Investment Inc.* (2005) 127 Cal.App.4th [1238,] 1258 (in challenging a foreclosure, plaintiff must allege 'prejudicial procedural irregularity' that 'injured' the plaintiff).

"The circumstances at bar are nearly identical to the cases cited above: Plaintiff here also concedes that the loan was

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[3] *Yvanova* disapproved *Fontenot* and *Siliga*, as well as *Jenkins*, to the extent they held borrowers lack standing to challenge an assignment of the deed of trust as void. (*Yvanova*, *supra*, 62 Cal.4th at p. 939, fn. 13.)

defaulted upon but attacks the securitization of [her] defaulted loan without alleging how the securitization has caused [her] any damages. Even assuming the truth of Plaintiff's untimely securitization of [her] loan, Plaintiff's position would be exactly the same as if the securitization was timely: the balance of the $700,000 loan Plaintiff borrowed would still remain outstanding . . . . The speculative harm alleged of the potential for a foreclosure proceeding stems not from the alleged untimely securitization, but rather from the fact that [she] defaulted on the loan. Furthermore, given that Countrywide has rescinded its Notice of Default and reinstated the Deed of Trust, there is no foreclosure action pending and this Court does not see how Plaintiff will be able to amend [her] complaint to allege actual damages or how those damages were caused by the alleged improprieties in the securitization."

(2) *No merit to Cooper's argument that* Yvanova *relieves her of having to allege injury.*

Cooper asserts that after *Yvanova*, a borrower does not have to allege prejudice to demonstrate standing. In support, she relies on the following paragraph in that decision: "In deciding the limited question on review, we are concerned only with prejudice in the sense of an injury sufficiently concrete and personal to provide standing, not with prejudice as a possible element of the wrongful foreclosure tort. As it relates to standing, we disagree with defendants' analysis of prejudice from an illegal foreclosure. *A foreclosed-upon borrower clearly meets the general standard for standing to sue by showing an invasion of his or her legally protected interests* (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 175)--*the borrower has lost ownership to the home in an allegedly illegal trustee's sale*. (See

Culhane, *supra*, 708 F.3d at p. 289 [foreclosed-upon borrower has sufficient personal stake in action against foreclosing entity to meet federal standing requirement].) Moreover, the bank or other entity that ordered the foreclosure would not have done so absent the allegedly void assignment. Thus '[t]he identified harm--the foreclosure--can be traced directly to [the foreclosing entity's] exercise of the authority purportedly delegated by the assignment.' " (*Yvanova*, *supra*, 62 Cal.4th at p. 937, italics ours, fn. omitted.)

As already discussed, *Yvanova* expressly did not address pleading requirements for *preforeclosure* lawsuits. Moreover, Cooper's reliance on the cited passage in *Yvanova* is misplaced. *Yvanova* states a *foreclosed-upon borrower* has standing to sue by virtue of having lost home ownership in an allegedly illegal trustee's sale, and thereby having suffered "an injury sufficiently concrete and personal to provide standing." (*Yvanova*, *supra*, 62 Cal.4th at p. 937.) That language is of no assistance to Cooper in her *preforeclosure* lawsuit -- she has not lost her home to foreclosure, and in fact, it appears that no foreclosure is pending at this time.

Therefore, we reject Cooper's theory that *Yvanova* relieves her of having to allege prejudice or harm.

d. *No merit to Cooper's related argument that the trial court's reliance on cases that later were disapproved by* Yvanova *requires reversal.*

Cooper contends reversal is required because the trial court relied on three cases that were disapproved in *Yvanova*, i.e., *Jenkins*, *supra*, 216 Cal.App.4th 497, *Fontenot*, *supra*, 198 Cal.App.4th 256, and *Siliga*, *supra*, 219 Cal.App.4th 75. The argument is unavailing.

Yvanova stated it disapproved those decisions "to the extent they held borrowers lack standing to challenge an assignment of the deed of trust as void." (*Yvanova*, *supra*, 62 Cal.4th at p. 939, fn. 13.) However, *Yvanova* made clear that it was not addressing the use of a lawsuit to preempt a nonjudicial foreclosure (*id.* at p. 934), and that its analysis was limited to "whether a wrongful foreclosure plaintiff may challenge an assignment to the foreclosing entity as void." (*Id.* at p. 935.) Accordingly, *Yvanova* is of no assistance to Cooper in this preforeclosure action.

4. *No merit to Cooper's tender argument.*

Cooper contends the trial court erred in dismissing her cause of action for quiet title on the ground that she failed to allege that she had tendered the amount of the loan. Cooper asserts that because the securitized trust's claim on her home was based on a *void* assignment, occurring years after the closing date of the securitized trust, the securitized trust was not her true creditor, and therefore she was not required to plead tender. (*Glaski*, *supra*, 218 Cal.App.4th at p. 1100.)

We recognize *Glaski* held that a plaintiff's allegations regarding postclosing date attempts to transfer his deed of trust into a securitized trust were sufficient to state a basis for concluding the attempted transfers were *void*. (*Glaski*, *supra*, 218 Cal.App.4th at p. 1097.) However, *Yvanova* expressly offered no opinion as to *Glaski*'s correctness on that point (*Yvanova*, *supra*, 62 Cal.4th at pp. 940-941), and subsequent to the *Yvanova* decision, *Saterbak* concluded a belated assignment of a trust deed to a securitized trust is merely voidable rather than void. (*Saterbak*, *supra*, 245 Cal.App.4th at p. 815; see also *Rajamin*, *supra*, 757 F.3d at pp. 88-89 ["the weight of New York authority

is contrary to plaintiffs' contention that any failure to comply with the terms of the PSAs rendered defendants' acquisition of plaintiffs' loans and mortgages void as a matter of trust law"; "an unauthorized act by the trustee is not void but merely voidable by the beneficiary"].)

Guided by the weight of authority, which has rejected *Glaski's* interpretation of New York law, we conclude that a belated assignment to a securitized trust, made after the securitized trust's closing date, is merely voidable and not void. Therefore, the voidness exception to the tender rule has no application here. Cooper has failed to tender the amount of the loan and therefore lacks standing to challenge the belated assignment of her debt to the securitized trust.

5. *No merit to Cooper's argument that she is entitled to bring a preforeclosure action because she alleged the assignment to the securitized trust was void.*

Next, Cooper contends that because she alleges specific facts to show the assignment is *void*, she is entitled to maintain a *preforeclosure* action to stop the foreclosure sale from going forward. Assuming arguendo a void assignment is a basis for bringing a preforeclosure action, we conclude that Cooper failed to allege facts showing the assignment was void.

By way of background, *Gomes, supra,* 192 Cal.App.4th 1149, in disallowing a preemptive action against the foreclosing entity, explained that allowing such an action would impose the additional requirement that the foreclosing entity demonstrate in court that it is authorized to initiate a foreclosure before the foreclosure could proceed. (*Id*. at p. 1154, fn. 5.) The *Jenkins* court summarized *Gomes*'s analysis as follows: "After examining the nonjudicial foreclosure statutes and considering the well-

established purposes of nonjudicial foreclosure, the *Gomes* court found no express or implied grounds for allowing such a preemptive action. (*Id*. at p. 1156.) Consequently, the *Gomes* court concluded that allowing a trustor-debtor to pursue such an action, absent a '*specific factual basis* for alleging that the foreclosure was not initiated by the correct party' would unnecessarily 'interject the courts into [the] comprehensive nonjudicial scheme' created by the Legislature, and 'would be inconsistent with the policy behind nonjudicial foreclosure of providing a quick, inexpensive and efficient remedy. [Citation.]' (*Id*. at pp. 1154-1156 & fn. 5.)" (*Jenkins*, *supra*, 216 Cal.App.4th at p. 512.)

Cooper contends her preforeclosure lawsuit is viable because she alleged two specific factual bases for showing the assignment was void.

First, she alleged the June 2011 assignment from MERS to Mellon was void because it occurred more than three years after the closing date of the securitized trust of which Mellon was trustee. However, as already discussed, a belated assignment of a trust deed to a securitized trust is merely voidable rather than void. (*Saterbak*, *supra*, 245 Cal.App.4th at p. 815.)

Second, Cooper argues the assignment was void because the PSA governing the securitized trust required her promissory note to be endorsed in order to be transferred to the securitized trust, but the note was not duly endorsed. However, any failure to comply with the terms of the PSA renders Defendants' acquisition of Cooper's loan merely voidable by the trust beneficiary, rather than void. (*Saterbak*, *supra*, 245 Cal.App.4th at p. 815; *Rajamin*, *supra*, 757 F.3d at pp. 88-89.)

In sum, Cooper has not alleged facts showing a void assignment.

6. *The California Homeowners Bill of Rights (HBOR) does not confer standing*.

For the first time on appeal, Cooper relies on HBOR to argue that public policy now favors preforeclosure actions. However, the statutes she cites do not support her contention.

Civil Code section 2924, subdivision (a)(6), provides: "No entity shall record or cause a notice of default to be recorded or otherwise initiate the foreclosure process unless it is the holder of the beneficial interest under the mortgage or deed of trust, the original trustee or the substituted trustee under the deed of trust, or the designated agent of the holder of the beneficial interest. No agent of the holder of the beneficial interest under the mortgage or deed of trust, original trustee or substituted trustee under the deed of trust may record a notice of default or otherwise commence the foreclosure process except when acting within the scope of authority designated by the holder of the beneficial interest." However, this provision does not authorize a preforeclosure action for damages or injunctive relief. (See *Penermon v. Wells Fargo Bank, N.A.* (N.D.Cal.2014) 47 F.Supp.3d 982, 997 [concluding it was not authorized to provide damages for a violation of § 2924 as that section was excluded from § 2924.12; *Hernandez v. Select Portfolio, Inc.* (C.D.Cal. 2015) 2015 WL 3914741, *8 ["Because the California legislature clearly provided money damages as a remedy for certain HBOR violations, but not for others, the court is constrained to conclude that it did not intend to permit the recovery of money damages for a § 2924(a)(6) violation"].)

Next, Cooper relies on Civil Code section 2923.55, which imposes various requirements before a mortgage servicer may record a notice of default. Again, nothing in this section authorizes a preemptive lawsuit by a homeowner/borrower.

Cooper also invokes Civil Code section 2924.17, subdivision (b), which provides that "[b]efore recording or filing any of the documents described in subdivision (a), a mortgage servicer shall ensure that it has reviewed competent and reliable evidence to substantiate the borrower's default and the right to foreclose, including the borrower's loan status and loan information." However, Civil Code section 2924.17, subdivision (b) does not speak to the issue of preforeclosure litigation. The issue of remedies is covered in subdivision (c) of the statute, which authorizes civil penalties in an action brought by a governmental entity or in an administrative proceeding. (Civ. Code, § 2924.17, subd. (c).)

Finally, in her reply brief, Cooper invokes Civil Code section 2924.12, subdivision (a), which authorizes an action for injunctive relief to enjoin a material violation of various sections, including sections 2923.55 and 2924.17, if a trustee's deed upon sale has not been recorded. *Saterbak* covers the point. It explains that HBOR's effective date was January 1, 2013, and the statutory scheme is not retroactive. (*Saterbak*, *supra*, 245 Cal.App.4th at p. 818.) There, the plaintiff alleged the deed of trust was assigned in 2011 and the assignment was recorded in 2012, before HBOR took effect. (*Ibid.*) Although the notice of trustee's sale, scheduling the foreclosure sale, was recorded after HBOR took effect, the complaint challenged MERS's assignment of the deed of trust to a REMIC trust (which occurred before HBOR's effective date), not the notice of trustee's sale. Therefore,

HBOR did not confer standing to bring a preforeclosure suit challenging the validity of the assignment. (*Id*. at 818, fn. 8.)

Here, Cooper's lawsuit challenges the validity of the 2011 assignment of the deed of trust to Mellon. Because the assignment preceded the effective date of HBOR, Civil Code section 2924.12, subdivision (a), does not confer standing to bring a preforeclosure claim.

7. *Trial court properly concluded Cooper cannot allege delayed discovery of her fraud claim*.

Cooper's pleading invoked the delayed discovery rule. She alleged that as of 2007, her business manager made all of her loan payments; he concealed from her the amount of the loan payment following the loan refinance because he was stealing a significant amount of money from her; and she did not discover that her loan payments had nearly doubled following the refinance, rather than being reduced by half, until her attorney explained to her the meaning of a loan audit conducted on December 14, 2011.

In order to rely on the discovery rule for delayed accrual of a cause of action, " '[a] plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence.' " (*Fox v. Ethicon Endo-Surgery, Inc*. (2005) 35 Cal.4th 797, 808 (*Fox*).)

Cooper admitted in her pleading that she signed the refinance loan documents (loan closing date of January 2, 2007). Thus, Cooper had the opportunity at the inception to familiarize herself with the loan terms. Although Cooper pled that she "was given no opportunity to read and review the loan documents,

which she did not understand," in light "of the general principle that a party who signs a contract 'cannot complain of unfamiliarity with the language of the instrument' (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 710), the defrauded party must show a reasonable reliance on the misrepresentation that excuses the failure to familiarize himself or herself with the contents of the document. [Citations.] For instance, a 'party's unreasonable reliance on the other's misrepresentations, resulting in a failure to read a written agreement before signing it, is an insufficient basis, under the doctrine of fraud in the execution . . .' for permitting that party to void the agreement. (*Rosenthal v. Great Western Fin. Securities Corp.*, *supra*, 14 Cal.4th at p. 423.)" (*Pacific State Bank v. Greene* (2003) 110 Cal.App.4th 375, 393.) We conclude Cooper failed to allege sufficient facts excusing her failure to review the loan documents before signing them.

Further, the knowledge of Cooper's personal business manager/agent is imputed to Cooper, who entrusted her agent with handling her personal finances. An "employer is charged with the knowledge that an honest agent would have gained in the course of a reasonably diligent examination; . . . 'this rule reasonably imposes upon the [employer] the further duty of properly supervising the conduct of his trusted employee.' " (*Sun 'n Sand, Inc. v. United California Bank* (1978) 21 Cal.3d 671, 702.) There, the employer's loss derived from its failure to discharge with reasonable care its duty to supervise its employees, and because the employer permitted the fraud to be concealed by its lack of reasonable supervision, the employer could not assert such concealment to justify its delay in bringing suit. (*Ibid.*)

Here, Cooper has not alleged facts to show an inability to have made earlier discovery despite reasonable diligence. (*Fox*, *supra*, 35 Cal.4th at p. 808.) To the contrary, she pled she signed the loan documents without reading and reviewing them, that she entrusted all of her personal finances to her personal business manager as of 2007, that her business manager "revealed virtually no financial information to [her]," and that she did not even know the amount of her monthly loan payments. Cooper's allegations evince a failure to exercise reasonable care in supervising her agent's actions. As a consequence, the delayed discovery rule is inapplicable. Given Cooper's imputed knowledge of what her business manager knew, the cause of action for fraud, which was not brought until March 2014, is facially time-barred.

Finally, we reject Cooper's assertion that as an elderly and disabled plaintiff she is entitled to special protection with respect to delayed discovery. In support, she cites *Delaney v. Baker* (1999) 20 Cal.4th 23. The issue there was one of statutory construction, specifically, whether a health care provider which engages in "reckless neglect" of an elder adult within the meaning of Welfare and Institutions Code section 15657 is subject to heightened remedies under that statute, or whether section 15657.2 precludes the application of section 15657 under those circumstances. (20 Cal.4th at p. 27.) *Delaney* has no application here and does not relieve Cooper of her duty to exercise reasonable diligence and to supervise her agent.

DISPOSITION

The order of dismissal is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

STRATTON, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.